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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

16 CR 809 (VM)

6 RANDY TORRES, ET AL.,

7 Defendants.
-----x

8 New York, N.Y.
9 January 24, 2020
10 9:27 a.m.

11 Before:

12 HON. VICTOR MARRERO

13 District Judge

14 APPEARANCES

15 GEOFFREY S. BERMAN
16 United States Attorney for the
17 Southern District of New York
18 JESSICA K. FENDER
19 ANDEN F. CHOW
20 JACQUELINE KELLY
21 Assistant United States Attorneys

22 LAW OFFICE OF SAM A. SCHMIDT
23 Attorneys for Defendant Randy Torres
24 SAM SCHMIDT
25 ANDREW BERNSTEIN

26 DONALDSON & CHILLIEST
27 Attorneys for Defendant Walston Owen
28 XAVIER DONALDSON
29 ALAIN MASSENA

30 JOHN BURKE, ESQ.
31 Attorneys for Defendant Charles Ventura
32 JOHN M. BURKE
33 CHRISTOPHER WRIGHT

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1 THE COURT: Good morning. Thank you. Be seated.

2 This is a proceeding in the matter of the United
3 States v. Torres and others. It's docket no. 16 CR 0809.
4 Counsel please enter your appearances for the record.

5 MS. FENDER: Good morning, your Honor. Jessica
6 Fender, Anden Chow and Jacqueline Kelly on behalf of the
7 government and joined with us at counsel table is Victoria
8 Bosah who is our paralegal specialist.

9 MR. CHOW: Good morning, your Honor.

10 THE COURT: Good morning. Welcome.

11 MR. SCHMIDT: Good morning, your Honor. Sam Schmidt
12 and Andrew Bernstein for Randy Torres who is sitting in the
13 first row.

14 MR. BERNSTEIN: Good morning, your Honor.

15 THE COURT: Good morning.

16 MR. DONALDSON: Your Honor, Xavier Donaldson and
17 Mr. Alain Massena for Mr. Owen sitting in the first row, second
18 defendant.

19 MR. MASSENA: Good morning, your Honor.

20 THE COURT: Good morning.

21 MR. BURKE: Good morning, Judge. For Mr. Ventura,
22 John Burke. And Judge, this is Christopher Wright. He'll be
23 with me in this case.

24 MR. WRIGHT: Good morning, your Honor.

25 THE COURT: Good morning. Welcome.

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1 The Court scheduled this proceeding as the final
2 pretrial conference in this matter which is scheduled for
3 commencement of trial on February 3. And so we should go over
4 any questions that you may have concerning housekeeping or
5 procedural matters and rules, submissions.

6 I call to your attention that the Court entered a
7 decision and order in connection with the parties' various
8 motions in limine. It was docketed yesterday. So I assume
9 that you've had an opportunity to at least be aware that it is
10 now decided.

11 Questions that the parties may have that you may wish
12 to address?

13 Let me make a correction. The trial is scheduled to
14 start on February 4. You may remember that at the last
15 conference because of a conflict that Mr. Donaldson had on
16 February 3 we moved it to February 4.

17 Yes. Government. Ms. Fender.

18 MS. FENDER: Your Honor, we do have a few matters to
19 address and I'm happy to start wherever you wish.

20 Certainly we would like the opportunity to address and
21 to bring to your attention an additional fact with respect to
22 defendant Randy Torres' flight and the arguments that we made
23 with respect to that motion. But separately if you'd like to
24 wait to address that substantively.

25 On housekeeping matters we did want the opportunity to

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1 alert your Honor to prior plea discussions that had happened
2 with the various parties.

3 Also my understanding, your Honor, is that when we
4 returned the S8 indictment that the defendants were not
5 formally arraigned on that indictment; that we all planned to
6 wait until the final pretrial conference. So we would ask that
7 your Honor do that today.

8 THE COURT: All right.

9 MR. SCHMIDT: May I have a moment, your Honor?

10 THE COURT: Yes, you may.

11 (Counsel and defendants confer)

12 THE COURT: Let's proceed with the arraignment on the
13 superseding indictments.

14 Defendants please rise.

15 As the government has indicated, the government has
16 filed a superseding indictment in this matter on which the
17 defendants have not yet been arraigned so we'll proceed with
18 that at this point.

19 Mr. Schmidt, did you have something that you may wish?

20 MR. SCHMIDT: Yes, your Honor. That I've reviewed the
21 indictment with my client, Randy Torres. He waives the public
22 reading of the indictment and wishes to enter a plea of not
23 guilty.

24 THE COURT: Before you do that, let me ask each of the
25 defendants, let me first alert you that you have certain rights

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1 with respect to the superseding indictment. You have a right
2 not to make any statement. You may remain silent. If you have
3 already made statements to the authorities, you need not make
4 any additional statements. Any statements that you do make may
5 be used against you. I see that you're represented by counsel
6 and you have the right to be represented by counsel at all
7 future proceedings in this matter.

8 Before you answer, let me ask the clerk to administer
9 the oath to the defendants.

10 (Defendants sworn)

11 THE COURT: Let me ask the defendants either
12 individually or if counsel prefer through counsel whether you
13 have seen a copy of the indictment.

14 MR. MASSENA: As to Mr. Owen, your Honor, Mr. Owen has
15 had an opportunity to review the indictment, your Honor, and he
16 enters a plea of not guilty, your Honor.

17 THE COURT: Mr. Schmidt, you've already expressed.

18 MR. SCHMIDT: Yes, your Honor.

19 MR. BURKE: Judge, for Mr. Ventura we have the
20 indictment. We reviewed it. We waive the public reading.
21 Mr. Ventura will enter a plea of not guilty to all the counts
22 in the indictment, Judge.

23 THE COURT: All right. Thank you.

24 You may be seated.

25 Ms. Fender, next item.

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1 MS. FENDER: Sure, your Honor. So I think perhaps at
2 this point then it makes sense to go ahead and just state the
3 government's understanding of where things stood with respect
4 to plea discussions with the various parties.

5 THE COURT: Government please indicate whether it made
6 any formal offers of plea agreements to the defendants and
7 whether those offers were rejected by the defendants.

8 MS. FENDER: Yes. Thank you, your Honor.

9 With respect to Mr. Torres, there has been no official
10 offer made. There were discussions with counsel regarding a
11 theoretical plea with a cap of 300 months imprisonment, which
12 we were informed the defendant was not interested in pursuing.
13 That was on January 16, 2020.

14 With respect to Mr. Owens, we've had two rejected
15 offers. There was a written offer on August 2019 that had a
16 potential 300 months imprisonment guideline calculation with a
17 mandatory minimum of 60 months. And then there was a written
18 offer made in December of 2018 that was also rejected with a
19 guidelines of approximately 241 to 271 months. Both of those,
20 again, were rejected.

21 With regard to Mr. Ventura, there was an offer that
22 was made that was rejected on February 4, 2019 the offer was
23 made. It was a racketeering conspiracy potential plea with a
24 guideline range of 151 to 188 months imprisonment. And that,
25 again, was rejected.

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1 So at this point there are no outstanding plea offers
2 and we anticipate that we are proceeding to trial.

3 THE COURT: Thank you.

4 MS. FENDER: Your Honor, I spoke with your clerk
5 yesterday.

6 THE COURT: Before you proceed, let's --

7 MS. FENDER: Yes. I'm sorry, your Honor.

8 THE COURT: A little bit more housekeeping on that
9 issue.

10 The plea offers. I will ask the defendants again
11 either individually or through counsel to confirm on the record
12 that what the government has represented to the Court
13 concerning these plea offers and their rejection is accurate.

14 Mr. Schmidt.

15 MR. SCHMIDT: Your Honor, it is accurate. As the
16 government indicates, that there was a plea offer made. It was
17 not a final plea offer though it was -- the discussions went
18 beyond the discussion stage to an offer. And otherwise the
19 government's statement is correct.

20 THE COURT: Thank you.

21 MR. DONALDSON: Your Honor, as for Mr. Owen, it is
22 correct that we were provided a written plea agreement back I
23 believe in August. I discussed that with Mr. Owen. That was
24 rejected. We also provided a plea agreement, I believe, in
25 December 2018. That was also rejected after discussions with

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1 Mr. Owen. And just to add to that, modify a little bit, we
2 entertained some conversations recently regarding plea
3 negotiations. And I discussed that with Mr. Owen as well and
4 those were rejected.

5 THE COURT: Thank you.

6 MR. BURKE: Judge, on behalf of Mr. Ventura we've had
7 numerous discussions regarding the government's offer early on
8 in the case and throughout the case. He has rejected those
9 offers and we're here today.

10 THE COURT: All right. Let me ask more specifically,
11 counsel, again, whether the discussions that you had with your
12 clients, including advising them of the range of punishment
13 under the guidelines that was entailed in the government
14 offers.

15 MR. DONALDSON: For Mr. Owen, I'd say that we
16 discussed rather thoroughly Mr. Owen's exposure related to the
17 plea agreements provided both in writing in August as well as
18 in December. We discussed the exposure related to this case if
19 there is a loss at trial relating to the charges in this
20 indictment. We discussed the guideline exposures, statutory
21 exposures, the maximum exposures, the minimum exposures and
22 every other exposure I can think of related to this indictment.
23 So we feel comfortable that Mr. Owen has been thoroughly
24 explained the contours, statutory remedies, guideline ranges of
25 the indictment as well as the plea agreements provided to us

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1 both in written form and verbally.

2 THE COURT: Thank you.

3 Mr. Burke.

4 MR. BURKE: Judge, I've discussed with Mr. Ventura the
5 guidelines, statutory maximums, minimums. There's a ten-year
6 mandatory minimum on a discharge in the indictment, I believe,
7 Judge, which runs consecutive to other things if it goes bad.
8 We have discussed it many times. And that's where we are.

9 THE COURT: As well as the exposure if he were to go
10 to trial.

11 MR. BURKE: He does, your Honor.

12 THE COURT: Thank you.

13 MR. SCHMIDT: Your Honor, we have discussed the
14 guidelines and the maximum sentences regarding the charges,
15 depending on whatever the outcome of the trial is, with our
16 client and the guidelines in relation to the potential plea
17 offer that was made.

18 THE COURT: Thank you.

19 Let's proceed then. Let me, before we proceed,
20 indicate that the government has handed up a proposed 3500
21 protective order for the Court's endorsement. I assume that --
22 well let me ask defendants whether they have all seen this
23 proposed order.

24 Mr. Schmidt.

25 MR. SCHMIDT: Yes. I have seen this order and there

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1 are portions of this order that we object to and there are
2 portions of this order that we do not object to.

3 We do not object to what to do with ultimately the
4 3500 material at the end of the case. We have no objection as
5 to that. We have no objection as to the general group of
6 people who can view the 3500 material during the pendency of
7 the case or in the appeals. We have no objection generally to
8 that.

9 We do have an objection to the government's eyes only
10 request. We are now dealing with the tremendous amount of
11 material that as of today we can just now start discussing with
12 our clients, the discovery material that we have. The
13 government -- we don't know which material the government seeks
14 to extend the eyes only to February 4 because we don't have
15 that information with us but it seems to me that it is
16 inappropriate in the last, approximately last week of trial,
17 not to be able to discuss with our client 3500 material of
18 witnesses so we can adequately prepare for trial. Without
19 being able to discuss this material with our client prior to
20 trial, then I think that we're likely going to have a request
21 for an adjournment as soon as we have an ability to talk to our
22 client about it, whether it's a day or two days or three days,
23 I don't know, but not being able to discuss with our client
24 some of the material that we receive today I think is wrong and
25 improper.

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1 THE COURT: Thank you.

2 MS. FENDER: Your Honor, may I speak briefly? Because
3 I think this is a misunderstanding. And I will say with
4 respect to Mr. Schmidt that he just got this 3500 protective
5 order right before the court conference so maybe he's not had a
6 chance to read it thoroughly.

7 But the attorneys' eyes only provision actually says
8 that as of today, which is the day that we had agreed to
9 produce 3500 materials, that's the attorneys' eyes only
10 deadline. So effectively we will produce 3500 and they will be
11 in a position to share it with their client even if it's been
12 designated as attorneys' eyes only. That's on the bottom of
13 page two.

14 THE COURT: Mr. Schmidt, does that clarify at least
15 the grounds for your objection?

16 MR. SCHMIDT: Yes, it does.

17 THE COURT: Thank you.

18 Mr. Donaldson.

19 MR. DONALDSON: Judge, I understood Mr. Schmidt's
20 point but I just think -- I agree with the 3500 material
21 protective order language. Just I think the second paragraph
22 on page two, because we got it today, that was the confusing
23 part. It says until January 24. So I guess beginning today
24 and until -- well until February 4, 2020.

25 MR. SCHMIDT: That's just disseminating I guess

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1 identity.

2 MR. DONALDSON: No problem.

3 MR. SCHMIDT: Beyond the defendant.

4 THE COURT: Mr. Burke.

5 MR. BURKE: Most respectfully, Judge, I understand the
6 order. I understand orders of a similar nature given out in
7 most cases. However, I respectfully object to the fact that if
8 Mr. Ventura is to see the statements of the witnesses who are
9 going to testify at trial, someone is going to be sitting there
10 with him and he can't have that material to look at. I know --
11 I know about the safety issues. I know about everything. I
12 just think all these orders really are a Sixth Amendment
13 violation. We're going to get this material today, I believe,
14 or sometime today, given the 3500 material. We have ten days
15 before the trial. So the fact that someone has got to babysit
16 with Mr. Ventura or something while he looks at this material,
17 while we're trying to look at this material, there's 50
18 witnesses on this piece of paper here. I don't expect to see
19 50 witnesses at trial. And I know this is how things go here,
20 right. I am just registering my objection to the fact that
21 we're put in this position, right. He's got the right to be
22 ready for trial. We have the right to talk to him. He's got
23 the right to look at the stuff. So it just makes it very
24 difficult and cumbersome. I think it's unfair. I'll say no
25 more.

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1 THE COURT: All right. I think --

2 MR. DONALDSON: Judge, I'm sorry to interrupt. Just
3 so I'm clear. I may be reading it wrong. But I think that as
4 of today we can give it to the defendants and then they can
5 review it -- that's not correct? That's not correct? So they
6 cannot review it by themselves?

7 THE COURT: Ms. Fender, clarify the question.

8 MS. FENDER: Yes, your Honor. Just to put on the
9 record, that's correct, that the defendants would not be
10 allowed to keep the 3500 materials in the jail which, as
11 Mr. Burke has represented, is a quite common practice in many
12 cases but certainly we think is particularly appropriate here
13 with respect to all of the safety concerns that we've expressed
14 throughout the pendency of this case.

15 THE COURT: Thank you.

16 MR. SCHMIDT: Your Honor, if I may respond?

17 Last week I put in a request for an additional
18 paralegal for exactly this purpose so that she is able to visit
19 the facilities, so that she can go with the material to review
20 it with our client so we don't have to spend the initial time
21 reviewing all the material and then we can go back and review
22 the material that's the most important and the most useful to
23 discuss with him. We have not yet heard back from your Honor's
24 chambers as to whether that paralegal was approved. We sent it
25 through eVoucher, as we have to, which takes longer.

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1 THE COURT: Mr. Schmidt, let me cut you off. That
2 request was approved just a couple of days ago. So just look
3 at the docket sheet.

4 MR. SCHMIDT: Thank you very much, your Honor.

5 THE COURT: Coming back to Mr. Burke's concern,
6 Mr. Burke what you've raised is not a new matter in this
7 proceeding, nor indeed in any other case that goes to trial,
8 criminal case that goes to trial in this district. As seasoned
9 as you are, you're not only aware that the practice in most
10 criminal cases that go to trial is for the government to
11 produce the 3500 material on the Friday before the commencement
12 of trial on the Monday. So from that respect you can count
13 your blessings that you have at least ten days, more than most
14 counsel have in criminal cases, and in part that was a result
15 that came about because of your prior pleas for that
16 accommodation. And so I don't know that there is much more
17 that needs to be said on this matter. Some of the cases that I
18 have seen go to trial where the government has produced the
19 3500 material on the Friday before the Monday are every bit as
20 complicated as this one. So count your blessings.

21 MR. BURKE: I understand the Court's ruling and I know
22 you understand my objection, Judge.

23 THE COURT: I do.

24 MR. BURKE: It's all a question of context. If we
25 were across the street now in the state court, you know,

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1 fifteen days after arraignment. So I know that's not the rules
2 here. I understand that. And I'll stop objecting and I
3 understand the Court's ruling.

4 THE COURT: Thank you.

5 MR. DONALDSON: After I've read it again and reviewed
6 it again. I think I'm going to have to join Mr. Burke and note
7 my objection because as it's drafted -- and I think I
8 understand their intent but as it's drafted in the protective
9 order it says that we can do it after today but if they're
10 saying you cannot give it to the defendants after today then
11 I'm going to have to object to that as well.

12 THE COURT: Thank you.

13 If there's nothing else on this matter let's move on.
14 I've heard the arguments and the objections.

15 MR. SCHMIDT: Briefly, your Honor.

16 We have no problem, because we have extra staff, just
17 to go over it with our client.

18 One question I have is after the government opens and
19 they announce publicly who the witness is going to be and what
20 they're going to testify to, I would think then the limitation
21 for our client having the material to review it because this
22 trial is going to take a few weeks, is unnecessary at that
23 point. There might be some things, for example, obviously
24 addresses perhaps and some personal information that we can
25 redact for the government but for them to be able to review

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1 this material on their own at their leisure after the
2 announcement of who these witnesses are seemed to me to be
3 overkill and unnecessary.

4 THE COURT: Thank you.

5 Ms. Fender.

6 MS. FENDER: Your Honor, I would vehemently disagree
7 with that. I think we have seen, again, in this very case the
8 importance of people trying to smuggle in information and often
9 taking screenshots and pictures of discovery and things that
10 should not have been disclosed, getting that to the outside
11 world and an attempt to interfere with and intimidate witnesses
12 and/or their families. So we absolutely think that the order
13 as drafted is appropriate and we would urge your Honor to enter
14 it.

15 THE COURT: Thank you.

16 Having heard the parties' comments, objections and
17 concerns about the prohibitive order, I am satisfied that it is
18 appropriate for the order to proceed as is and I will so
19 endorse it.

20 Next, Ms. Fender.

21 MS. FENDER: Your Honor, as has already been
22 referenced a few times throughout this morning's proceedings we
23 spoke with your clerk yesterday and realized, and we apologize
24 that we had neglected to provide in advance of today's date, a
25 people and places list for your Honor's consideration. From

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1 reading your Honor's standing order we understood that to be a
2 list of all of the potential names, places, things that might
3 be important and discussed during the course of the trial.
4 This includes the government's witnesses but is not limited to
5 that.

6 We provided that list to your Honor. I will say that
7 right now it reflects only the government's names. We did
8 reach out last night, upon hearing from your Honor's clerk, to
9 request any input from the defense. But we're advised by
10 Mr. Torres' team that there were no names to be added and
11 otherwise did not hear from anyone.

12 We spoke with Mr. Donaldson this morning. We
13 understand that there's least one amendment which we are happy
14 to make and to recirculate to your Honor. I believe Detective
15 Jalin Bulding J-A-L-I-N B-U-L-D-I-N-G.

16 MR. DONALDSON: Detective Bulding.

17 MS. FENDER: And I've heard nothing from Mr. Burke.
18 So I don't believe there are any amendments.

19 MR. BURKE: I'll just chirp in now, Judge. I don't
20 really have a witness at this time, and I'm really kind of
21 reserving until I see what's happening with the case and I see
22 the 3500 the material. Look, I don't have five people flying
23 in from Hawaii or something. We my have some rebuttal or
24 police officers or something of that nature. I need to see an
25 outline of what their witnesses are going to say before I say I

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1 don't want to call anybody. So right now, Judge, I don't have
2 any names.

3 MS. FENDER: Fair enough, your Honor.

4 The only thing the government would point out is that
5 we understood that this list was to be used in part for
6 conducting an appropriate voir dire of the potential jury
7 members so that we could understand if there were any conflicts
8 or issues that needed to be vetted and so for that reason we
9 would ask that, even if it's overly broad, if the defense has
10 names that they think are going to come up that are not on this
11 list that they would add that.

12 THE COURT: That is critical. We cannot wait until
13 after the voir dire for any party to identify names of
14 individuals who may be referred to in the course of the voir
15 dire -- during the course of the trial. That has to be upfront
16 at the voir dire.

17 Mr. Schmidt, anything else?

18 MR. SCHMIDT: Yes, your Honor. There are actually I
19 think the government left out a few names in their list, even
20 the name of somebody on the indictment, in their papers, for
21 example, Caliber. We will see, going through our records, if
22 there are other names that are likely going to be raised on
23 cross-examination or direct examination and we will forward
24 the -- those additional names to your Honor prior to trial.

25 THE COURT: Thank you.

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1 The government will collect any such additional names
2 and references and issue a revised list not later than Friday
3 before the Monday of the trial or Monday before the Tuesday of
4 the trial.

5 MS. FENDER: By Monday, your Honor?

6 THE COURT: Thank you.

7 Ms. Fender, anything else from the government?

8 MS. FENDER: I hate to say it but yes, your Honor.

9 I wanted to address with your Honor briefly two
10 things. One, just to put your Honor on notice that because
11 we're just producing 3500 today, one of the issues we've not
12 had a chance to discuss with the defense yet is certain areas
13 or topics of cross-examination for certain of our witnesses
14 that we think will be inappropriate. We're going to be working
15 with the defense to see if the parties can reach an agreement
16 but I anticipate that they would have wanted to see the 3500
17 material before they agree or don't; and so if there are any
18 issues that we can't resolve, we will certainly bring those to
19 your Honor's attention as soon as possible.

20 Separately, I just wanted to, I guess, put on your
21 Honor's radar an issue with respect to the Facebook and social
22 media exhibits. So, as your Honor is aware, especially
23 Mr. Schmidt and the Torres counsel have pushed very hard for
24 early disclosure of the government's exhibits and particularly
25 social media. We represented in our papers that we were

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1 seeking to do that far enough in advance of trial that if there
2 were specific objections your Honor would have a chance to
3 address those.

4 We are doing everything that we can and indeed have
5 been working very diligently over the last week or two to try
6 to front load those exhibits. We're hopeful that we'll be able
7 to produce them to the defense by Monday so that they will be
8 in a position to raise any issues that they see fit with your
9 Honor. So we are doing what we can there.

10 Just another issue to sort of highlight for your Honor
11 that I don't think we're in a position to resolve it yet. We,
12 as your Honor knows, have been all working, including the
13 defense, very hard to resolve a number of issues and to reach
14 stipulations to try to streamline the trial. We have been
15 advised that at this point we're not going to be able to do
16 that, we don't think, with respect to the Facebook exhibits and
17 so we are planning to call a Facebook witness at this time.

18 Having spoken with defense counsel, it's not entirely
19 clear what their proposed exhibits would look like. We've
20 expressed some concerns as to whether or not the Facebook
21 witness will be in a position to authenticate those exhibits.
22 And so we'll have to see a little bit how this plays out but we
23 are continuing to dialogue about that but we anticipate that
24 that may be an issue that lands on your Honor's lap during the
25 trial because there are -- since there is a Facebook witness

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1 who can only authenticate certain types of Facebook evidence,
2 it may be that that puts the defense in a somewhat difficult
3 position, depending on how they create their exhibits. So
4 we've let them know that. We're trying to avoid the issue.

5 And then I think with respect to proceeding with the
6 trial, we wanted to let your Honor know we have a few witnesses
7 that we think will require interpreters. We're working to make
8 appropriate arrangements for those individuals.

9 MR. SCHMIDT: Your Honor, we greatly appreciate the
10 government trying to get their social media exhibits to us as
11 early as possible. I know, having done so much work in it,
12 it's sort of a monster, it's not easy to deal with.

13 She did raise one of the issues that we're trying to
14 resolve as well with the government is basically the
15 authentication of the material.

16 We have received from the government two types of
17 material from Facebook. One is a PDF printout of all of their
18 HTML files. And we have also then received from the
19 government -- from Facebook through the government the files in
20 HTML. So it's digital. And so you're capable of doing a lot
21 more things with it on the computer.

22 That material came from the government and we are more
23 likely to use that as the authentication of the material. The
24 government, my understanding is it plans to use the PDF as
25 authentication. We are going to try to work out something with

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1 the government so that both sides have the ability to present
2 their case in the manner that they wish to and that it will
3 accurately reflect the material received from Facebook.

4 The world is changing in court with all the digital
5 material and we're trying to make it both possible for the
6 parties to present it and for the jury to review it. And we're
7 working on that. And if we do reach an impasse, we'll let your
8 Honor know.

9 THE COURT: Let me comment on this question. I would
10 suggest that if the defense has some legitimate, good faith
11 basis for challenging the authenticity of a document that is
12 produced by the government from a third party, especially one
13 as well known as Facebook or any of the other major
14 telecommunications entities, telephone company, etc., by all
15 means raise your issue and attempt as vigorously as you can to
16 raise objections. If there isn't a good faith reason to
17 challenge the document, if there is no good faith basis for a
18 suggestion that somehow the government is attempting to
19 introduce inauthentic documents and therefore essentially
20 engaging in unlawful conduct, that's entirely a different
21 story. But often we get into trials where witnesses are
22 brought in from telephone companies, for example, or some other
23 entities to authenticate documents and it is a pure waste of
24 time, those individuals' time, to come to trial only to say:
25 Yes, this is an authentic document and then be subjected to

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1 lengthy cross-examination as to why maybe it's not authentic.
2 It becomes a fishing expedition and wastes time of the court,
3 the jury, and the parties.

4 So bear those observations in mind as you engage in
5 this discussion with the government and make every effort to
6 avoid unnecessary controversy if, in fact, again, there is no
7 legitimate good faith basis for challenging the authenticity of
8 a particular document or if you have an alternative document
9 that suggests that somehow the one the government has produced
10 is not the real one.

11 Mr. Schmidt.

12 MR. SCHMIDT: Your Honor, that's actually the reverse.
13 I don't think we're going to have a problem with authentication
14 with the material that the government provided to us. It's the
15 issue of whether they're going to have a problem with us
16 offering evidence in the form that we received from them. So
17 it's not that we view there is going to be any difficulty in
18 the authentication. It's more the government may -- hesitating
19 as to the authentication of the material that we received from
20 them in the digital format. So that's what we're trying to
21 work out. So it's not new.

22 THE COURT: I presume what I said just now applies not
23 only to defendants; it applies to the government as well. If
24 the documents are authentic because they are brought in from
25 one source the government says produced them and introduced

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1 against the defendants, well if the government produced those
2 documents because they were made available to it by Facebook,
3 the documents should not become inauthentic when offered by the
4 defendants.

5 MS. FENDER: Your Honor, we certainly appreciate all
6 of that and I think the issue that we're having is that it's
7 not that it's just the original materials coming back to us
8 that, for instance, they want to use different pages than we
9 want to use. Of course we would have no problem with that.

10 The issue is that we understand that they've been
11 working with their specialist, whose name escapes me at this
12 moment, but the person that was appointed by the court to help
13 them with social media exhibits, that that person is taking the
14 original evidence and is manipulating it, and I don't mean to
15 suggest in bad faith in any way, but manipulating it to make it
16 what they see -- view as more readable or more compact or what
17 have you.

18 So we have expressed our concern that unless we
19 understand exactly where the source material is for that and
20 can quickly authenticate those exhibits in real time, we're
21 going to have to object because we don't know how these were
22 prepared or where the underlying evidence comes from.

23 So what we've represented to the defense is, just like
24 us, if they want to go back to the original documents then, of
25 course, we will authenticate them. But it's these manipulated

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1 defense exhibits that we are expressing potential concern
2 about. We are continuing to try to discuss it. I'm sure that
3 we will continue to have discussions over the next week. I
4 just wanted to let your Honor know.

5 THE COURT: Thank you. That's fair enough.

6 Anything else?

7 Mr. Burke.

8 MR. BURKE: Switching topics for a moment, Judge.

9 Going to jury selection. I think it's Rule 24 of the Federal
10 Rules of Criminal Procedure. They get six peremps, we get ten.
11 But since there are multiple defendants, we can ask the Court
12 for more challenges. And there's three of us. It's one trial
13 that's going to be three separate trials.

14 So on behalf of Mr. Ventura and I believe the other
15 defendants also we're asking the Court to consider giving us
16 extra challenges. Although we've been working together -- at
17 least everyone else has been working, Judge -- to get ready for
18 the case and we'll be joining in things, we have separate
19 defenses. They may not be overlapping. I think this is a case
20 where the defendants should be given extra challenges, Judge.

21 As to the exact amount, I'll leave it to the Court or
22 I'll leave everything to the Court. It's up to you. But
23 fifteen would be good. There's three of us here. That's my
24 application, Judge.

25 THE COURT: All right. Anything else?

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1 MS. FENDER: Your Honor, we understand that Your Honor
2 has the authority to do that. We think that under the
3 circumstances and given what we anticipate the defenses will be
4 that ten is actually sufficient but if your Honor is inclined
5 to increase the number we would just ask that the government's
6 number also increase at a proportionate amount.

7 THE COURT: Thank you.

8 MR. BURKE: Judge, most explicitly, Rule 24 says the
9 defense gets more challenges. However, it's up to the Court.

10 THE COURT: Thank you.

11 Mr. Donaldson, you seem to be at the cusp of a
12 thought.

13 MR. DONALDSON: Just a little antsy, Judge. I'm ready
14 to start this trial.

15 We agree with Mr. Burke. We spoke about that I think
16 last week. We agree with that. I've never seen a situation
17 where the government gets more challenges as well but if they
18 want more -- if they want more, they can have -- it's up to
19 you. I've never seen that but we'll take the fifteen.

20 I was going to discuss a different topic if we're
21 finished with that one.

22 MS. FENDER: Just as a data point, your Honor, there
23 are members of the U.S. Attorney's Office here at this table
24 that have had trials in which the government has had increased
25 numbers of challenges granted, so for whatever that's worth.

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1 THE COURT: OK. Mr. Donaldson.

2 MR. DONALDSON: No. I'm finished with that one.

3 Should I move on to the next point?

4 THE COURT: Yes. If you have a new topic.

5 MR. DONALDSON: Yes, I do. Just briefly regarding
6 housekeeping. So we did enter into a lot of stipps. I don't
7 know exactly how many. Maybe eleven, twelve -- a lot of stipps
8 with the goal, we think, of trying to move this efficiently and
9 not arguing about what I think are not material points to argue
10 about. But that being said, we also did talk about -- the
11 language of the stipps were rather inclusive regarding the
12 documents will come in or the evidence will come in. What we
13 don't have exactly in the stipps is the language that they are
14 coming in subject to some objections regarding relevance before
15 they actually get into evidence. So I just want to make sure
16 we're still clear on that.

17 Specifically I'm talking about the medical records and
18 the ballistics and things like that. I'm not talking about the
19 authenticity of it. We're not talking about the weight of
20 them, but we are talking about whether or not they are still
21 going to be relevant and the background is going to allow them
22 to come in. So I just want to make sure we are still in
23 agreement with that with the government that we are maintaining
24 that objection but we're just stipulating to what the language
25 of the actual stipulation is without it coming in without the

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1 proper background relevancy. So we're maintaining those
2 relevancy objections.

3 As far as the medical records are concerned, they gave
4 us about nine, I believe, medical records and these medical
5 records are anywhere between a thousand and thousands of pages
6 in length. I informed the government that we would be
7 stipulating to the fact that these people were injured. That's
8 not -- but what we are going to maintain is our objections to
9 any contest in the medical records that do not go directly to
10 medical care and treatment. I think they agree with that as
11 well. So we will be able to redact that information before it
12 goes to the jury. I think that's pretty standard but I think
13 they've agreed to that as well. So just so those -- that's out
14 there. I think we all agree on that. Right.

15 THE COURT: OK.

16 MS. FENDER: I will represent on the record, yes,
17 we've had those conversations with Mr. Donaldson. Of course
18 the government is not planning to offer any evidence that is
19 not relevant.

20 And specifically with respect to the medical records,
21 Mr. Donaldson is quite correct. They are voluminous. We will
22 be seeking, if they are admitted because they are otherwise
23 relevant, to redact out anything that would not be relevant
24 that does not go to medical treatment.

25 MR. BURKE: And your Honor, forgive me. It's a very

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rudimentary housekeeping matter but I would just ask that any objection made by a defendant will be deemed an objection made by all unless people opt out. It might save a lot of time, especially during the trial, if we make an objection we don't all have to say we join, we join, we join. That's one thing.

The second thing is, Judge, I haven't had the privilege of picking a jury in front of the Court. So I don't know exactly what mechanics you use when you pick the jury. I don't know if you bring them all in at once or you do it, put them in the box. I'm sure you're going to explain it, but I just wanted to get it in my mind before I leave.

THE COURT: Mr. Donaldson.

MR. DONALDSON: I love John. We've had some trials together. But before we get to that, we do want to talk about the layout of the court as well. But I did tell the government that I was going to, with the Court's permission, supplement the -- our requests to charge and our voir dire. I'll just say it. I am a huge proponent of the implicit bias instructions and language that I'm helping to draft for this district and they're using in the Ninth Circuit already. I think that it is necessary nowadays. I think the Supreme Court has had recent decisions directly addressing the fact that implicit bias plays significant roles in jury decisions.

In this case, particularly because of the nature of the -- let's just call it race-based language, the derogatory

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1 language in a lot of the conversations, phonecalls, e-mails,
2 etc. I can think of no other case where this is more --
3 probably more appropriate.

4 So I told the government I was going to provide some
5 language to them related to implicit bias. I would hope the
6 Court would strongly consider it. I think it should go into
7 the initial questions when we talk about jury selection as well
8 as into the jury instructions.

9 With the Court's permission, I'm going to submit that
10 to the Court, to the government first for their review, and
11 then I'll send it to the Court by Sunday, if the Court will
12 allow me to do that.

13 THE COURT: Thank you.

14 Whatever you have share with the government and if
15 there is no objection we'll consider it.

16 Anything else?

17 Ms. Fender.

18 MS. FENDER: I just want to make sure I'm clear with
19 respect to Mr. Burke's point. Is everyone joining in the
20 request that any objection by one defendant is an objection for
21 all, and is your Honor going to proceed in that manner, just
22 for clarity of the record.

23 THE COURT: That could be very unwieldy. It may apply
24 in some circumstances but it may not necessarily apply in all.
25 So we'll have to deal with that as the occasion arises.

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1 MS. FENDER: Very good, your Honor.

2 It sounds like there are some questions about jury
3 selection that are still pending.

4 MR. BURKE: I'm just wondering how the Court selects a
5 jury.

6 THE COURT: I was going to deal with that at the very
7 end when I deal with whatever else is on the table.

8 MS. FENDER: If it's my turn again, your Honor, then
9 the last thing I wanted to raise was the specifics with respect
10 to the -- Mr. Torres' flight and the open questions about what
11 additional evidence, if any, the government could bring to
12 bear, if this is a good time to address that.

13 THE COURT: Is this additional material that you've
14 made available to the defense --

15 MS. FENDER: I've made it available to Mr. Torres --

16 THE COURT: -- or is this an issue that you wish to
17 address in a letter?

18 MS. FENDER: Certainly, your Honor, it's pretty
19 straightforward. I have given the text messages that we would
20 rely on to Mr. Torres' counsel a few days ago. I have not
21 disseminated it to the other two cocounsel because I don't
22 think the issue related to them but I have copies today.

23 Just very briefly, and we're happy to address this by
24 letter if your Honor would prefer. We were able to obtain
25 photographs of text messages that Mr. Torres sent to certain

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1 individuals on the morning of his arrest. The text messages
2 were personally observed by an officer detective that we would
3 call to reflect that he took those pictures. And the text
4 messages were sent on the very day that the other codefendants
5 of Mr. Torres were being arrested. They are timed from about
6 5:40 in the morning and they reflect that indeed cops are at
7 the door and that he's leaving.

8 So I have copies for your Honor and for counsel today,
9 be happy to hand those up if your Honor would like to see them.

10 THE COURT: You may.

11 MS. FENDER: But we think this addresses the point
12 that your Honor made in your ruling that there was not specific
13 information to show that Mr. Torres was aware of the fact that
14 he was actually going to be subject to arrest on that day.

15 MR. SCHMIDT: Your Honor, I think it may be more
16 appropriate for the government to address this in writing
17 because we'd like to address this in writing. The fact that
18 police were at the door doesn't mean that he is aware that he's
19 going to be arrested for the specific charges that he was
20 arrested for. So I'm not clear how this really changes it.
21 And I think the government should address that in a letter and
22 then we will respond.

23 THE COURT: Ms. Fender.

24 MS. FENDER: We're happy to do that, your Honor. We
25 think that your Honor's ruling was pretty clear and we think

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1 these text messages are pretty clear so we think they do go to
2 the precise point that was made but if your Honor would like to
3 see additional briefing we're happy to do that in a brief
4 letter.

5 THE COURT: Why don't you just submit a very brief
6 letter.

7 MS. FENDER: Very good. Thank you.

8 THE COURT: Mr. Bernstein, did you have something?

9 MR. BERNSTEIN: Yes, your Honor. Just another
10 housekeeping matter as to the layout of the defense table. I
11 believe the Torres team will be three, Owen team will be three,
12 and the defendants obviously, and Mr. Ventura, two. And so we
13 just want to figure out what is the normal layout. We are all
14 having computers as well.

15 THE COURT: There is no normal layout in this kind of
16 situation. It is not that often that you have a combination of
17 three defendants and twelve different attorneys however I think
18 the only way to deal with it is for the parties to see what
19 arrangements you can make among yourselves insofar as
20 accommodating yourselves at the table and I believe some of the
21 chairs or benches behind the table. There are times in which
22 counsel also line up chairs along the wall to my left. I leave
23 it up to you to see how you can allocate your space
24 accordingly.

25 Coming back to Mr. Burke's questions insofar as the

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1 mechanics of the jury selection. Some of that is set forth in
2 the Court's individual practices. My general practice is to
3 when we have a jury of 14, 12 regular and 2 alternates, as we
4 will probably have in this case, we will put 34 jurors selected
5 at random from the wheel into the box and then we proceed to
6 allocution as to those 34. And as any of them are excused for
7 good reason, then we call another one from the wheel,
8 substitute for the one who has been excused. And at the end of
9 that process through the entire voir dire when we have the 34
10 remaining, I ask the parties whether there are any additional
11 challenges for cause. In there are none, then we proceed to
12 the selection of the twelve regular and two alternate jurors in
13 the robing room with each side having the number of peremptory
14 objections that have been specified by the Court. And that
15 selection, again, that is in the individual practices,
16 generally allow for challenges to any name on the board without
17 any restrictions on particular order. So meaning if let's say
18 jurors number one and two and three have been not challenged in
19 the first round, their names still remain for challenges in
20 subsequent rounds. That, in general, is the simplified version
21 of the process. It will become more concrete as we go along.

22 Is there anything else?

23 MS. FENDER: Your Honor, just for the Court's
24 consideration, given the anticipated length of the trial which
25 might be three weeks, we would ask your Honor to at least

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1 consider at one additional alternate.

2 MR. SCHMIDT: I'm sorry. I didn't hear the end of
3 that.

4 THE COURT: The government has asked the Court to
5 consider an additional alternate in view of the anticipated
6 length of the trial.

7 MR. DONALDSON: No objection.

8 MR. SCHMIDT: No objection, your Honor.

9 THE COURT: Anything else?

10 MS. FENDER: Not from the government, your Honor.

11 THE COURT: Hearing nothing else. Thank you. Have a
12 good day. Have a good weekend.

13 (Adjourned)

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